Supreme Court, U.S.
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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DENNIS J. PAPPAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. Are a defendant's rights guaranteed by the Due Process Clause violated by his preventive detention for a period of over twenty months, where that defendant continues to face further extensive pretrial detention, where the government is responsible for much of the delay, and where the defendant is not charged with any crime of violence, and does not have a criminal record?

2. Should this Court establish guidelines for determining the circumstances under which preventative detention violates the Due Process Clause?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Pappas and the United States) to the proceedings in the United States Court of Appeals for the Second Circuit.

Andrea Pappas, wife of petitioner, is a co-defendant in the underlying indictment CR 95-368 (S-1) which is currently pending in the United States District Court for the Eastern District of New York. Petitioner knows of no related cases pending.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DENNIS J. PAPPAS respectfully petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit entered on February 3, 1997, denying his motion for release on reasonable conditions and affirming the judgment of the district court.

OPINIONS BELOW

The order of the United States Court of Appeals for the Second Circuit (Walker, Parker and Heaney, JJ.), denying petitioner's motion for release on reasonable conditions and affirming the judgment of the district court was filed on February 3, 1997, but the court filed no opinion. A copy of the order is Appendix A to this petition. The district court's memorandum and order is unpublished. A copy is Appendix B to this petition.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit was entered on February 3, 1997. This petition is filed on or before the ninetieth day thereafter. Sup. Ct. R. 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254 (1).

TEXT OF STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent sections of 18 U.S.C. § 3142 (Bail Reform Act of 1984) are set forth in Appendix C.

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "... no person shall ... be deprived of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Petitioner Dennis J. Pappas is a forty-nine year old attorney with no prior criminal record. He was arrested on July 19, 1995 and was ordered detained. The United States District Court for the Eastern District of New York has denied his release upon reasonable conditions. The United States Court of Appeals for the Second Circuit has affirmed the district court. Petitioner has no criminal convictions, enjoys strong community ties, and suffers from debilitating, degenerative, and incurable heart disease. He has now spent over twenty (20) months in preventive detention. It is expected that the trial, when it finally commences, may take six (6) months to complete. Given the district court's most recent prediction that trial will not begin before September 1997, it is very likely that petitioner will spend over twenty-six (26) months in preventive detention before his trial even begins.

A. Procedural History

In a nineteen-count indictment, petitioner is charged with a complex series of frauds. None of the charges involves the use of violence. The first detention hearing commenced in September, 1995. On November 17, 1995 United States District Judge Thomas C. Platt detained petitioner on the sole ground that he was a danger to the community. The United States Court of Appeals for the Second Circuit affirmed the detention order on December 7, 1995. United States v. Pappas, No. 95-1669.

On March 11, 1996, petitioner again moved for bail, arguing that the passage of eight months, with the certainty of extensive future detention, violated due process of law. The motion was returnable on March 22, 1996. Over defense objection, the bail hearing was adjourned to March 29, 1996. The bail motion was finally heard on April 3, 1996. On May

7, 1996, the district court again denied bail. The United States Court of Appeals for the Second Circuit affirmed the detention order on August 14, 1996, United States v. Pappas, No. 96-1323, but without prejudice to the petitioner renewing his motion in the district court if there was further undue delay by the government.

In accordance with the August 14th order, petitioner again moved for release on reasonable conditions on November 8, 1996. On January 8, 1997 the district court again denied release. The United States Court of Appeals for the Second Circuit, without opinion, affirmed on February 3, 1997.

Statement of Lower Court Jurisdiction Under Sup. Ct. R. 14.1(g)(ii).

The district court's subject matter jurisdiction was invoked in this case under 18 U.S.C. § 3141, et seq. (Release and Detention Pending Judicial Proceedings), in that the indictment alleges the commission of federal offenses. The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and 18 U.S.C. § 3731 and was timely invoked.

B. Statement of Facts

Petitioner Dennis J. Pappas is a forty-nine year old attorney with no prior criminal record. Petitioner has spent his entire life on Long Island, New York. Prior to his arrest, he lived with his wife of almost thirty years in their family home in Commack, New York. Petitioner suffers from debilitating, degenerative, and incurable heart disease.

On July 19, 1995 a nineteen-count indictment was returned charging petitioner with a complex series of frauds. There were no allegations that petitioner ever engaged in violence, or directed or aided and abetted the use of violence by others.

Petitioner and his wife, Andrea Pappas, a co-defendant in the case, were arrested on July 19, 1996. Andrea Pappas was arraigned the next day and released on a $500,000.00 bond, secured by her home. Due to his serious medical condition, petitioner was arraigned on a stretcher on July 21, 1995.

The government moved for detention on the ground that petitioner was a risk of flight and a danger to the community. The first detention hearing began in September, 1995. On November 17, 1995 the district court ordered petitioner detained on the sole ground that he was a danger to the community.

The district court found that petitioner had worked closely with Columbo Family Acting Boss Victor Orena, and that petitioner had knowledge of Mr. Orena's extortionate activities. The United States Court of Appeals for the Second Circuit affirmed the detention order on December 7, 1995. United States v. Pappas, No. 95-1669.

Defense motions were to be filed by January 5, 1996. The main focus was a motion to dismiss, based upon the violation of an immunity agreement. The defense asserted that government agents had promised petitioner immunity in exchange for his work on a government project. Subsidiary to this contention was petitioner's assertion that, in the course of this work, agents interfered with his right to counsel and wrongfully used immunized information against him.

On January 4, 1996 the government obtained a sweeping protective order under the Classified Information Procedure Act (CIPA), 18 U.S.C. App. 3, § 1, et seq. That order, some of which remains under seal, required that all motions referring to petitioner's government work be submitted to a Court Security Officer for processing under CIPA. Defense counsel and petitioner were ordered to execute Memoranda of Understanding as a condition precedent to receiving classified material from the government in discovery.

The district court did not appoint a Court Security Officer before the defense motions were due and therefore, substantive motions could not be filed although they were ready for submission. A court security officer was finally appointed on February 20, 1996. Defense counsel were directed to immediately apply for security clearances so that the pre-trial hearing could go forward. The Court Security Officer told the court that it would take between forty-five and sixty days to clear defense counsel. The completed security clearance applications were sent to the Justice Department by Federal Express on February 22, 1996.

Petitioner again moved for bail on March 11, 1996, arguing that the passage of eight months, with the certainty of extensive future detention, violated due process of law. The motion was returnable on March 22, 1996. On March 15, 1996 the government asked for more time to answer the bail motion. Over defense objection, the bail hearing was adjourned to March 29, 1996.

The bail motion was finally heard on April 3, 1996. The government urged petitioner's continued detention on both the grounds of dangerousness and risk of flight, but proffered no new facts to support the flight risk. The district court reserved decision. At this hearing, the government admitted its failure to answer the substantive defense motions and promised to do so by April 9, 1996. At the same hearing, the government reported that it had no information as to when the security clearances would be approved.

In its answer to the defense motion to dismiss, the government said little more than that an evidentiary hearing would be needed. It acknowledged that classified information would be required at such a hearing, that classified information would be supplied in discovery, and that a CIPA Section 6 hearing was required. First, defense counsel had to obtain security clearances.

Oral argument on the motions was scheduled for April 29, 1996. All counsel appeared, but the district court stated that it had not even read the motions, and was not prepared to proceed. On May 7, 1996 the district court denied bail, reiterating the finding that petitioner was a danger, and also finding for the first time that he was a risk of flight.

1. Winter 1995-1996: Discovery Requests

Petitioner and the government agree that petitioner performed certain work for the government. Petitioner alleges, and the government denies, that in exchange for that work, petitioner was promised immunity from indictment. The government agreed that hearings were needed, and admitted that extensive documentation of these issues existed.

In defense motions, all documents that "relate to or reference" the project on which petitioner worked were requested. This discovery was to be provided to the defense prior to the hearings. Following that filing, the government took an extraordinary series of steps designed to impede defense access to the classified information.

2. Early Spring To Early Summer 1996: Security Clearance Delays

In February, 1996 the government refused to provide classified discovery because defense counsel had not been issued security clearances. On February 22, 1996 defense counsel submitted completed security packets to the FBI. The government stated that the clearance process should take between forty-five and sixty days, but that efforts would be made to expedite the process.

Instead of speeding the process, the prosecution's efforts appeared to slow it down. Despite repeated inquiry by defense counsel through the months of April, May, and June,

no clearances were granted and no was progress reported.

On July 2, 1996--almost five months after his application was submitted--attorney Ronald L. Kuby was notified that his application for a security clearance had been denied.

3. Summer 1996: The District Court Rules; The Prosecutor Falsely Assures The Court That He Has Complied With Discovery Orders

On July 18, 1996 the district court attempted to cut through the Gordian knot and ruled that security clearances would not be required. The government was ordered to provide all relevant discovery to defense counsel. Any disputed items, or items in need of special protection, were to be submitted to the Court by July 25, 1996.

On the basis of that record, the United States Court of Appeals for the Second Circuit heard oral argument on petitioner's second bail appeal. The prosecutor specifically told the appellate court that the government had submitted all such discovery to the district court. That was untrue. Not a single document from the file kept by the Office of Professional Responsibility had been delivered. These sixty-seven documents were not provided to the district court until January 3, 1997.

During the same oral argument, the prosecutor assured the court that pre-trial hearings would probably begin by the end of September, 1996 followed by an immediate trial. In fact, as the prosecutor knew full well at the time, pre-trial hearings were months away, and trial was even more remote. Indeed, the hearings are now scheduled to begin on April 21, 1997, commencing with a hearing as to whether petitioner's medical condition allows him to proceed further.

On August 19, 1996 defense counsel wrote to the government, demanding the opportunity to review the classified discovery. The letter was not answered. Finally, in

desperation, defense counsel contacted the district court with respect to the continuing failure of the government to comply with discovery.

4. Fall 1996: Piecemeal Discovery

Defense counsel was not granted access to any of the classified discovery until September 18, 1996. At that time, the government furnished two heavily redacted affidavits to defense counsel, totaling ten pages. The next day, the district court expressed its astonishment that these two affidavits, bound in one document, constituted the total amount of discovery. The prosecutor insisted the government did not withhold anything except the areas that had been redacted in the two affidavits

Based upon defense counsel's review of the two affidavits that were provided, it was clear that a substantial number of documents related to the Pappas project had not been submitted. The prosecutor then informed the district court that it had submitted other classified material to the court, but not to counsel. The district court had no recollection of this.

The district court ruled the redactions improper, but stayed this ruling to give the prosecution an opportunity to object, on a line-by-line basis, to further disclosures. As to the defense, the district court directed petitioner to supply a detailed listing of the documents it believed existed and had been withheld. The defense did so in a sealed submission made on September 24, 1996.

On November 8, 1996, against this backdrop of extensive, government-created delay, petitioner again moved the district court for release on reasonable conditions, in accordance with the August 14, 1996 order of the United States Court of Appeals for the Second Circuit. Petitioner offered a three million dollar bond, to be secured by four

pieces of real property with at least $817,000.00 in unencumbered, fair market value. These properties were owned by his mother-in-law and four of his closest friends. His two grown children pledged all of their personalty. Moreover, a total of nine sureties agreed to sign the bond, with each one being jointly and severally liable.

But there was more. The district court proposed a series of draconian and restrictive conditions designed to imprison petitioner within his home. These conditions included restricting petitioner to his home except for religious, medical, and legal needs, restricting visitors to the home to a pre-approved list, monitoring of telephone calls, and a blanket ban on defendant driving an automobile. Petitioner agreed to all of the proposed conditions, save one.

The only condition that petitioner could not fulfill was the court's proposal that he pay for 24-hour per day armed guards to surround his home. The cost of such services was a staggering $10,000.00 per week. Petitioner is in bankruptcy, and all of his assets are in the hands of a bankruptcy trustee. However, petitioner agreed to the presence of the guards; they simply would have to be paid for by the government because he could not afford them. The district court reserved decision.

At the next court appearance, on November 22, 1996, defense counsel pointed out that the government still had not complied with the district court's order to provide all of the classified discovery. At this point, the prosecution shifted to a different tactic, arguing that the information sought by the defendant should await production until the direct examination of the witness was heard. The district court disagreed and directed that all pages of 3500 materials be produced.

In response to the district court's direction, the government made additional disclosures to the defense on December 2, 1996. Many of the redactions in the two affidavits were then disclosed. The government also provided

redacted versions of nine additional documents. The quantity of discovery had just quintupled. And that was not all.

Unbeknownst to the defense until the December 2, 1996 court session, there existed an additional binder of material, eventually denominated as government Exhibits 7 through 98, totaling hundreds of pages, that the government had submitted to the district court in camera, and ex parte. The government opposed release of any of those documents, for any reason.

The district court stated its intention to begin reviewing this material, ex parte. The district court had apparently not examined that material before. After commencing review of the material, the district court expressed its preliminary view that a great deal of this material would be provided to petitioner and his counsel. However, the district court again stayed production of such discovery until the prosecution had an opportunity to review the proposed discovery, raise objections, or propose substitutions. Since petitioner had no access to any of those documents, the defense had no idea what the binder contained.

5. Winter 1996-1997: More Delay

At the December 12, 1996 court appearance, the government provided redacted versions of Exhibits 7 through 99 for the defense review. It was a short review. The documents were redacted, wholesale. After reviewing the documents, the district court found the extent of the redactions to be completely unacceptable. The government was directed to prepare a statement with respect to each redaction, summarizing the reasons for its protection. Again, the prosecution suggested delaying the production of the discovery until after the hearings. Again, the district court refused, concluding that this would double the hearings and observing that defense counsel did not want to prolong the

proceedings.

The government stated that it hoped its summaries would be ready by December 23, 1996. Based upon that projection, the defense requested hearings starting January 6, 1997. The prosecution requested a one week delay. Defense counsel again raised the issue of the Office of Professional Responsibility (OPR) file and its whereabouts. The prosecution expressed ignorance of the file, but promised to locate it.

To aid in this endeavor, defense counsel submitted a copy of the reply it had received from the OPR. Not only did such a file exist, but it contained a total of sixty-seven documents, seven of which it disclosed in full, twenty-seven of which were disclosed with heavy redactions, and thirty-three of which were not disclosed at all. Even a cursory review of the documents indicated that they addressed the issue of petitioner's government work.

On December 30, 1996 the government finally finished the task of summarizing the material. Again, additional disclosures were made to the defense. However, the OPR file was still not included. The district court excoriated the government for its continuing failure to provide relevant discovery. The district court ordered the government to produce the file, and set an appearance for the next day to review the file.

The next day, the file still had not arrived. The government insisted that it would arrive by Thursday, January 2, 1997, at the latest. As to the redactions, the district court ordered the government to supply an affidavit from the Attorney General justifying them.

On January 2, 1997 the parties again convened. Again the OPR file had not arrived. However, the court had conducted further in camera review and, based upon that review, ordered the government to disclose additional discovery to the defense.

Finally, on January 3, 1997 the OPR file arrived. The

government reviewed the file with the district court. After that review, by letter dated January 6, 1997, the government announced that it would disclose additional documents.

On January 8, 1997 the district court ruled on petitioner's November 8th bail motion. It found that the government had made no greater showing than it made at the inception of detention as to degree of flight risk and potential danger to the community. Nonetheless, without any mention of the Due Process Clause or extensive appellate jurisprudence on the permissible length of pretrial detention, the district court again denied release. Petitioner again appealed to the Second Circuit.

On January 15, 1997 defense counsel was able to begin the review of the latest discovery, although there were still matters outstanding. Also on January 15, 1997, in order to avoid a court order requiring further classified discovery, the government agreed to admit relevant facts that the classified information would tend to prove.

In preparation for the hearings, defense counsel began reviewing the entire corpus of discovery that had been provided over the past year. On February 14, 1997 defense counsel discovered that the district court had engaged in an ex parte strategy session with the prosecution, on December 4, 1996. During that session the district court engaged in a wide-ranging, free-wheeling discussion with the two prosecutors in charge of the case, discussing petitioner's defense and methods by which it might be kept from, or allowed before, the jury. Defense counsel immediately filed a motion to recuse, which was denied on February 27, 1997. A Petition for a Writ of Mandamus is pending.

On February 3, 1997, the United States Court of Appeals for the Second Circuit, without opinion, affirmed on the district court's denial of bail.

6. Spring and Summer 1997: The Delay Continues While Petitioner Languishes in Detention

Pretrial hearings are now scheduled for April 21, 1997 and, based upon past practice, could stretch out for months. The government still has not complied with its discovery obligations. The district court recently predicted that trial will not commence until September 1997, or twenty-six (26) months after petitioner was originally detained. At this point, petitioner is facing "perpetual detention."

REASONS FOR GRANTING THE WRIT

1. The United States Court of Appeals for the Second Circuit has decided an important question of federal law regarding a due process challenge to extended preventive detention, and this Court has not yet settled, but should do so, the point at which the length of preventive detention violates a defendant's due process rights.

The Court should grant a writ of certiorari in this case to address an important question of federal law concerning the due process rights of a defendant who is subjected to lengthy preventive detention pursuant to 18 U.S.C. § 3141, et seq. (Bail Reform Act of 1984). The Bail Reform Act itself contains no express time limits on the period of detention. Yet, the Due Process Clause demands that there be some limitation on the length of pretrial detention.

This Court's decision in United States v. Salerno, 481 U.S. 739 (1987) held that preventive detention was not facially unconstitutional. But the due process limits as to permissible length of such detention were not resolved by the Salerno decision. Although this Court has never squarely addressed and settled the issue, the United States Court of Appeals for the Second Circuit has ruled on due process challenges to preventive detention in several cases since the enactment of the Bail Reform Act of 1984.

Moreover, other circuits have also decided such due process challenges on a case-by-case basis. United States v. Infelise, 934 F.2d 103 (7th Cir. 1991), on remand, 765 F.Supp.960, reconsideration denied, 771 F.Supp. 245 (1991); United States v. Gelfuso, 838 F.2d 358 (9th Cir. 1988). In many respects, though, all of the cases have been decided in a vacuum since this Court has not yet determined what length of detention violates the Due Process Clause.

Until such limitations are defined by this Court, there

are no clear standards for courts to apply in deciding due process challenges to preventive detention. The lack of continuity and possibility of drastically different results from circuit to circuit, and indeed, from district to district, in and of themselves implicate due process concerns. Furthermore, even within a circuit, whatever guidelines have been developed may be applied in unpredictable ways.

For example, the United States Court of Appeals for the Second Circuit has developed a comprehensive body of law regarding the permissible duration of pretrial detention. By the standards which have evolved through the case law, petitioner's release upon reasonable conditions is mandated. Yet, he remains in preventive detention due in part to the absence of direction from this Court and also, to the arbitrary interpretation and application of what criteria have been developed.

Much of the law on preventive detention in the Second Circuit was developed in the course of bail appeals by accused members of Los Macheteros, characterized as "one of the most notorious terrorist organizations in the western hemisphere." United States v. Melendez-Carrion, (Melendez-Carrion I), 790 F.2d 984, 1009 (2d Cir. 1986) (Timbers, J., dissenting), cert. denied, 479 U.S. 978 (1986).

In a series of cases arising from the same prosecution, the Second Circuit thoroughly delineated the permissible length of detention and the circumstances under which it must be ended. United States v. Melendez-Carrion (Melendez-Carrion I); United States v. Berrios-Berrios, 791 F.2d 246 (2d Cir. 1986); United States v. Gonzalez-Claudio, 806 F.2d 334 (2d Cir. 1986); United States v. Melendez-Carrion, (Melendez-Carrion II), 820 F.2d 56 (2d Cir. 1987), reh'g denied, 837 F.2d 61 (1987); United States v. Ojeda-Rios, 846 F.2d 167 (2d Cir. 1988).

According to the due process challenges which have been decided by the Second Circuit, heightened scrutiny is

invoked when the length of detention exceeds six months. See, e.g., United States v. Melendez-Carrion (Melendez-Carrion I),; United States v. LoFranco, 620 F.Supp. 1324 (N.D.N.Y. 1985), appeal dismissed sub nom., United States v. Cheeseman, 783 F.2d 38 (2d Cir. 1986). Until this case, the Second Circuit has never authorized preventive detention solely on the ground of dangerousness for more than eight months. See, United States v. Melendez-Carrion, (Melendez-Carrion I) at 1008; accord, United States v. Frisone, 795 F.2d 1 (2d Cir. 1986).

Detention of one year creates a "serious due process problem." United States v. Berrios-Berrios, 791 F.2d at 254. While the court declined to rule in Gonzales-Claudio that such extended detention rose to the level of a per se violation of due process, it nonetheless observed that "[d]etention that has lasted for fourteen months and, without speculation, is scheduled to last considerably longer, points strongly to a denial of due process." Id. at 334.

In Gonzales-Claudio, the Second Circuit vacated the detention orders of the district court and remanded the case for the prompt setting of reasonable conditions of release in accordance with 18 U.S.C. § 3142 (c). In so doing, the Second Circuit held as follows at 343:

> [W]e conclude that the continued detention of [defendants] beyond fourteen months would exceed even the flexible standards of due process.... We recognize that the release of these defendants upon reasonable conditions creates a risk that they may flee...That risk is serious, but of at least equal gravity is the preventive detention after fourteen months of those who are presumed innocent and whose trial to determine guilt or innocence will not even begin until detention has lasted eighteen months. In mandating fundamental fairness, the Due Process Clause endeavors to set

outer limits at which risks to society must be accepted to avoid unconscionable deprivations of the liberty of individuals.

In a related case, United States v. Ojeda-Rios, the Second Circuit directed the release of the alleged leader of Los Macheteros after twenty-eight months of preventive detention. 846 F.2d 167 (2d Cir. 1988). At that time, Mr. Ojeda-Rios bore the singular distinction of being held in pretrial detention longer than any other person in American history. Since the detention of Mr. Ojeda-Rios, only the World Trade Center bombers, the head of the Blue Thunder heroin empire, and petitioner, Dennis J. Pappas, have been held for a comparable period of time.

Petitioner has been detained for over twenty months. According to the district court's most recent estimate, trial is unlikely to commence before September 1997, or twenty-six (26) months after petitioner was originally detained. When it does finally begin, the trial could last for six months. The length of petitioner's preventive detention is already substantially longer than that permitted in Gonzales-Claudio and is projected, if detention continues, to exceed that permitted in Ojeda-Rios.

Pretrial detention of this duration has almost never been authorized by any court. In the handful of cases where such detention was approved, the defendants were always charged with serious acts of violence and presented extraordinary risks of flight far beyond anything customarily seen in an American courtroom. For example, in United States v. El-Gabrowny, 35 F.3d 63 (2d Cir. 1994), the court permitted twenty-seven months of detention for an Egyptian defendant charged in the World Trade Center bombing, caught in possession of forged passports, and who was a member of the "Jihad Organization."

In United States v. Millan, 4 F.3d 1038 (2d Cir. 1993),

cert. denied, ___U.S.___, 114 S.Ct. 1375 (1994), it was held that thirty-one months of detention was acceptable for dangerous defendants who ran the Blue Thunder heroin operation, worth 65 million dollars, and who participated in acts of violence or directed the violence of others. See also, Melendez-Carrion II, 820 F.2d at 59 (nineteen months of detention acceptable for the two leaders of Los Macheteros, both of whom had history of flight and living clandestinely in the United States and abroad, neither of whom had any contacts in the community).

In Gonzales-Claudio, the United States Court of Appeals for the Second Circuit established guidelines for determination of future cases involving prolonged detention. The three factors considered are length of detention; extent to which the prosecution bears some responsibility for any delays; and the degree to which the defendant constitutes a risk of flight. If this three-part test is applied to petitioner's case, the result should be his release on reasonable conditions.

However, as stated supra, the Second Circuit has failed to follow its own guidelines in petitioner's case. Petitioner remains in preventive detention, with no realistic end in sight. The Second Circuit has failed to uniformly and fairly apply the very guidelines it developed. Since this Court has not formulated guidelines, nor determined the outer limits of detention permitted under the Due Process Clause, the Second Circuit, as well as the other circuits, has no definitive guidance on this issue.

That due process concerns are critical when considering preventive detention cannot be disputed. As described in Melendez-Carrion I, when enacting the Bail Reform Act of 1984, Congress was acutely aware of the constitutional problems that would be created by open-ended detention. To allay fears that perpetual detention could occur, the Act's proponents emphasized "an absolute 90-day limit [to detention], without exceptions, was contemplated" by Congress.

Id. at 996. Indeed, when Senator Mitchell proposed an amendment requiring an absolute sixty-day time limit on preventive detention, to "maintain the essential temporary nature of pretrial detention as a matter of law," 130 Cong. Rec. 938, 939-940 (Feb. 3, 1984), several Senators decried it as duplicative and unnecessary. They explained that such limitations were already in place in the Speedy Trial Act (18 U.S.C. § 3161, et seq.). The 90-day limit of the Speedy Trial Act was considered the "worst case limit" by one opponent of the Mitchell amendment, and the "upper bound" by another. Id. at 941 and 943 (Statements of Senators Thurmond and Laxalt.)

Another Senator elaborated:

> [The Speedy Trial Act] insures that the objectives of the Mitchell amendment will be carried out: no defendant will be detained indefinitely while the processes of justice grind to a halt....No evidence has been presented at anytime in our hearings that the 90-day Speedy Trial Act limit has not worked perfectly well to protect against lengthy incarceration.

Id. at 945 (Statement of Senator Grassley) (emphasis added). See also, United States v. Columbo, 777 F.2d 96 (2d Cir. 1985).

The history of the case sub judice belies the statement "no defendant will be detained indefinitely while the processes of justice grind to a halt." The Speedy Trial Act has not served to ensure against lengthy pre-trial detention. Indeed, with the rise of multi-defendant "megatrials," detention of over one year has become the norm, rather than the exception. This Court should now provide a judicial remedy for the problem which concerned some Congress members thirteen years ago.

Petitioner's continued detention violates his constitutional right to due process of law. The length of time which he has been detained has extended well beyond that which due process deems acceptable and permissible.

This Court should grant certiorari in order to resolve the specific question presented by petitioner's case. Moreover, certiorari should be granted in order to resolve the recurring issue of determining the circumstances under which preventative detention violates the Due Process Clause.

CONCLUSION

For the foregoing reasons, petitioner Dennis J. Pappas prays that this Court grant his petition for a writ of certiorari, vacate the judgment below, and remand to the United States District Court with instructions to release him upon reasonable conditions.

Respectfully submitted,

BY: RONALD L. KUBY
Attorney for Petitioner

Of Counsel:
DANIEL M. PEREZ
EVE S. ROSAHN

March 28, 1997.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of February, one thousand nine hundred and ninety-seven,

BEFORE: Hon. John M. Walker, Jr.,
Hon. Fred I. Parker,
Hon. Gerald W. Heaney,
Circuit Judges

UNITED STATES OF AMERICA,
Respondent,

v. No. 97-1038

DENNIS J. PAPPAS,
Defendant-Appellant.

Defendant's motion for leave to file oversized memorandum is granted. The government's motion for permission to file oversized response is granted.

Defendant's motion for release on reasonable condi-

tions is hereby denied. The judgment of the district court is affirmed.

s/ John M. Walker, Jr.

s/ Fred I. Parker (per JMW)

s/ Gerald W. Heaney (per JMW)

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

DENNIS PAPPAS, et al.

Defendant.

----------x

MEMORANDUM AND ORDER

95-CR-368 (S-1)(TCP)

PLATT, District Judge.

This is the third, if not the fourth, application by defendant Dennis Pappas for release from detention on reasonable conditions. Defendant predicates his application on the following arguments:

1. That defendant's lengthy detention before trial both violates due process and mandates his release;

2. That the Government is responsible for the delay that has transpired since the denial of his last appeal in

a. Its continued non-compliance with the Court's order regarding classified material and

b. Its continued non-compliance with the Court's order regarding discovery of non-classified material.

3. That defendant's degree of dangerousness and flight risk are so remote as to mandate his release.

Following defendant's first application in the fall of 1995, the Court held an evidentiary bail hearing and wrote a 25 page Memorandum and Order dated November 17, 1995, setting forth its reasons for denying release.

In response to a further application, the Court wrote a second Order dated November 30, 1995, again denying release on bail.

In the spring of 1996, defendant, again, renewed his application for bail claiming the following changed circumstances:

1. The length of time he had been detained;

2. His alleged participation in the Government operation and its impact on this Court's view of his dangerousness; and

3. The delay defendant anticipated in qualifying his new lawyer and in holding procedures, including hearings required under the Classified Information Procedures Act, to enable him to corroborate in part or in whole his alleged defense to the charges herein.

In a four page Order dated May 7, 1996, this Court, again, denied defendant's application for bail.

Defendant appealed this Court's first decision of November 17, 1995. The Court of Appeals for the Second Circuit affirmed in a Summary Order from the Bench. United States v. Dennis J. Pappas, No. 95-1669 (December 7, 1995). Defendant appealed, again, following this Court's decision of May 7, 1996, with the same result. United States v. Dennis J. Pappas, No. 96-1323 (1996)(copies of this Court's three decisions are annexed hereto and made part hereof).

In connection with his most recent application, defendant proposed to secure his release with a number of properties and sureties which are inadequate and unacceptable to the Government (see attached letter to the Court dated

January 3, 1997). Also in connection with defendant's latest application, the Court proposed release on certain conditions upon which, save for conditions one and five, the parties might have been able to reach some agreement (see attached draft). As to condition five, defendant claimed he was unable to pay for guards selected by the Government to assure his confinement to his house and argued that that was an unreasonable condition to impose upon him.

While more time has elapsed since defendant's application last spring for release on bail (which as indicated above was denied by this Court and the Court of Appeals), the grounds he now asserts are essentially the same except defendant now claims the Government is responsible for the delay that transpired since the denial of his last appeal. However, it is clear to this Court that both sides have been responsible for any delay. The fact of the matter is that defendant's extensive request for documents and materials and the problems involved in reviewing and ruling on classified documents have taken an inordinate amount of the parties' and this Court's time, with the result that only now are we arriving at the closure of the discovery process in anticipation of pre-trial evidentiary hearings which defendant claims are necessary because they constitute a substantial basis for his defense to the charges herein.

It is expected that the pre-trial evidentiary hearings will take several days and, if the case against defendant is not dismissed because of certain allegedly outrageous behavior on the part of the Government and its agents, the jury selection process will begin with the summoning of approximately 750 prospective jurors; then an initial selection of 100 or more jurors on the basis of written interrogatories to the panel; followed by an IRS examination of the surviving jurors; and then the commencement of a trial (which is estimated to take anywhere between six weeks and six months).

The circumstances, however, with respect to the

danger defendant poses to the community and to the system of justice and the flight risk he presents have not changed since his initial indictment and arrest many months ago.

The Court has devoted a very substantial portion of its time and efforts to this case (to the exclusion and perhaps detriment of many other ready cases on its calendar). Though very conscious of the length of defendant's pre-trial detention, the Court believes it has contributed very little, if any, time to the delay in bringing this case to trial. It is a complex case made especially so by the application of the Classified Information Procedures Act ("CIPA"), by reason of which this Court has had to review and pass on literally hundred of documents and listen to innumerable arguments by counsel for both sides with respect to the same. This CIPA process, unfortunately, is not yet complete and there is no certainty that it is going to be complete within the foreseeable future. Arguments on the legal issues involving the application of CIPA and the discovery of documents pursuant thereto have, in short, been interminable.

Nonetheless, as indicated, the circumstances requiring defendant's retention in custody pending trial have not changed. The Court is not prepared to release defendant based on the inadequacy of his proposed security and sureties and his unwillingness to pay for guards needed to insure his retention as his home if he were to be released thereto.

Accordingly, defendant's latest application for release must be, and the same hereby is, denied.

SO ORDERED.

s/ Thomas C. Platt
District Judge, U.S.D.C.

Dated: Uniondale, New York
January 8, 1997

APPENDIX C

§3142. Release or detention of a defendant pending trial

(a) In general. -- Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be --

(1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;

(2) released on a condition or combination of conditions under subsection (c) of this section;

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or

(4) detained under subsection (e) of this section.

* * * *

(c) Release on conditions. -- (1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person --

(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community --

* * * *

(e) Detention. -- If, after a hearing pursuant to the provisions

of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial. In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that --
(1) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;
(2) the offense described in paragraph (1) of this subsection was committed while the person was on release pending trial for a federal, State, or local offense, and
(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1) of this subsection, whichever is later.

* * * *

(f)(1) upon motion of the attorney for the Government, in a case that involves-(A) a crime of violence;
(B) an offense of which the maximum sentence is life imprisonment or death;
(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.); or
(D) any felony if the person has been convicted of two or more offenses described in subparagraphs (A) through (C) of

this paragraph, or two or more State or local offense that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

* * * *

(g) Factors to be considered. -- The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning --
(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
(2) the weight of the evidence against the person;
(3) the history and characteristics of the person, including --
(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the

designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

* * * *